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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339
)
) Div. 6
)
) **OBJECTION TO STATE'S**
) **MOTION TO EXTEND TIME**
) **FOR ADDITIONAL**
) **DISCLOSURE DATED**
) **SEPTEMBER 20, 2010 AND**
) **MOTION IN LIMINE TO**
) **PRECLUDE EVIDENCE**
) **RELATED TO THE**
) **ANONYMOUS EMAIL**
)
) **(Expedited Oral Argument and**
) **Evidentiary Hearing Requested)**
)
) **FILED UNDER SEAL**

22 Steven DeMocker, by and through counsel, hereby objects to the State's Motion
23 to Extend Time for Additional Disclosure pursuant to Rule 15.6(d) filed on September
24 20, 2010, and requests that the Court grant a Motion in Limine to preclude introduction
25
26
27
28

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 OCT 14 PM 3: 19

JEANNE HICKS, CLERK

BY: B. Chamberlain

1 of testimony or evidence related to the anonymous email, evidence or testimony related
2 to the drafting or transmission of the email, and the “free talk” of July 21, 2009, based
3 on Ethical Rule 3.7, and Arizona Rules of Evidence 403 and 404(b). The objection and
4 motion are based on the due process clause, the confrontation clause, the Fifth, Sixth
5 and Eighth Amendments and Arizona counterparts, Arizona Rules of Evidence, Arizona
6 Rules of Criminal Procedure and the following Memorandum of Points and Authorities.
7

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. Background Regarding the Information Related to the Authorship and** 10 **Transmission of the Email, the Email Itself, and Mr. DeMocker’s** 11 **“Free Talk” of July 21, 2009**

12 The State filed a Motion to Extend Time for Additional Disclosure
13 Pursuant to 15.6(d) requesting leave for an extension of time to disclose and use
14 at trial the following: (1) the anonymous email; (2) testimony of Renee Girard
15 regarding this anonymous email; and (3) a transcript and recording of Girard’s
16 September 19, 2010 interview. The State’s Motion, which was not filed under
17 seal and resulted in a front page story in the Prescott *Daily Courier*, alleges that
18 Mr. DeMocker “prepared the language of the email, showed a handwritten
19 version of the email to Renee Girard during a jail visit prior to June 19, 2009 and
20 then Steven DeMocker gave the dictated email to his minor daughter, Charlotte
21 DeMocker with instructions to go to Phoenix and send it from an untraceable
22 location.” The State indicated it intends to use this information in its case in
23 chief. The State’s Notice of Pending Disclosure, which was also not filed under
24 seal and has been cited in the press, asserts that the email is a “confession by
25 Defendant and is noticed as such, including Defendant’s statement of July 21,
26 2009.”

27 The State had previously moved to preclude this evidence and the defense
28 has advised the Court that it no longer seeks to introduce this evidence.

1 Following the disclosure of this new development, the [REDACTED]
2 [REDACTED] alleging, among other things, that all defense
3 counsel were complicit with Mr. DeMocker in a plot "to defraud the Court" with
4 respect to this email. [REDACTED] was the subject of the defense Motion
5 to Dismiss with Prejudice or to disqualify the Yavapai County Attorney's Office.
6 It was also the subject of counsels' motion to withdraw and for a mistrial. In
7 considering these issues, defense counsel noted the implications of Ethical Rule
8 3.7, lawyer as witness.

9 Mr. DeMocker has now been arrested and charged with eight new offenses
10 related to the authorship and transmission of the anonymous email. The probable
11 cause statement has been cited extensively in the press as well.

12 In his Under Advisement Ruling denying defense counsels' motion to
13 withdraw, Judge Brutinel indicated that "the trial court should carefully consider
14 whether to admit the email evidence, and if it is admitted, how to admit it in such
15 a way as to obviate the need for testimony from counsel." [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 **II. The Information Related to the Authorship and Transmission of the**
20 **Email, the Email Itself, and Mr. DeMocker's "Free Talk" Should be**
21 **Precluded Pursuant to Ethical Rule 3.7 and Arizona Rules of**
22 **Evidence 403 and 404(b)**

23 The State should be precluded from offering this evidence because it would
24 lead to a violation of Ethical Rule 3.7. As the Under Advisement Ruling notes,
25 counsel is generally prohibited from being a witness under ER 3.7. However,
26 counsels' testimony about the issues related to the anonymous email will be
27 necessary if this email or evidence related to it is admitted.

28 The following testimony from counsel may be required if information
relating to the email is admitted: facts relating to the receipt of information by

1 Mr. DeMocker through a voice in the vent in the Yavapai County Detention
2 Center and transmission of this information to counsel; counsels' subsequent
3 follow-up and conversations with Mr. DeMocker regarding the voice in the vent;
4 the receipt of additional information by Mr. DeMocker in the Yavapai County
5 Detention Center that was the basis for the email; the circumstances surrounding
6 the July 21, 2009 "free talk"; Mr. DeMocker's belief in the contents of the email;
7 and counsels' communications with Mr. DeMocker about his beliefs. These areas
8 of testimony by counsel are all related to this email and the information the State
9 now seeks to admit. Admitting this evidence would result in a Rule 3.7 violation
10 by requiring counsel to testify.

11 The Court should also preclude this evidence under Arizona Rules of Evidence
12 404(b) and 403. Arizona Rule of Evidence 404(b) provides that prior evidence of other
13 wrongs or acts is not admissible to prove character to show action in conformity
14 therewith. Arizona Rule of Evidence 403 provides that relevant evidence may be
15 excluded if its probative value is substantially outweighed by the danger of unfair
16 prejudice, confusion of the issues, or misleading the jury, or by consideration of undue
17 delay, waste of time, or needless presentation of cumulative evidence.

18 In order to admit evidence of a prior bad act, the court must find by clear and
19 convincing evidence that the acts occurred and were committed by the person alleged to
20 have done so. If the Court so finds, the act is not admissible to prove the character of a
21 person or to show action in conformity therewith. Rather it is only admissible if offered
22 as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or
23 absence of mistake or accident. The court must also consider the probative value
24 against the prejudicial effect of such evidence pursuant to Rule 403.

25 The State should be prohibited from admitting this email evidence because: 1) it
26 is offering the acts for the improper purpose of proving character; 2) the State cannot
27 make the required clear and convincing showing for these acts as a "confession" as they
28

1 are purporting them to be, and 3) the evidence does not fall within any exception to
2 Rule 404(b). There is no evidence to rebut Mr. DeMocker's belief in the truth of this
3 email. The sending of the anonymous email is in no way a "confession" but was instead
4 the desperate act of an innocent man, wrongfully accused.

5 Finally this evidence should be precluded pursuant to Rule 403 based on the
6 danger of unfair prejudice and its minimal probative value. The fact that Mr. DeMocker
7 received this information and passed it along in a way that has now lead to criminal
8 charges is extremely prejudicial and very minimally probative. The State's attempt to
9 mischaracterize this evidence as a "confession" only amplifies the prejudicial possibility
10 with this jury.

11 **CONCLUSION**

12 This Court should deny the State's Motion to Extend Time for Additional
13 Disclosure Pursuant to Rule 15.6(d) filed September 20, 2010 and grant a Motion in
14 Limine to preclude evidence and testimony relating to the anonymous email, its
15 drafting, transmission or any other evidence.

16
17 DATED this 14th day of October, 2010.

18
19 By: 

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28 Attorneys for Defendant

1 **ORIGINAL** of the foregoing hand delivered for
2 filing this 14th day of October, 2010, with:

3 Jeanne Hicks
4 Clerk of the Court
5 Yavapai County Superior Court
6 120 S. Cortez
7 Prescott, AZ 86303

8 **COPIES** of the foregoing hand delivered this
9 this 14th day of October, 2010, to:

10 The Hon. Warren R. Darrow
11 Judge Pro Tem B
12 120 S. Cortez
13 Prescott, AZ 86303

14 Joseph C. Butner, Esq.
15 Jeffrey Paupore, Esq.
16 Prescott Courthouse basket

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